Wong Thai Kuai & Anor v Kansas Corp Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO D5–28–364 OF 2006
RAMLY ALI J
27 FEBRUARY 2007

Civil Procedure — Pleadings — Intitulement — Winding up petition pursuant to s 218 — Failed to state under which limb of s 218 — Whether fatal

Companies and Corporations — Winding up — Petition under s 218 — Debt is disputed substantially — Notice of indebtedness not evidence of debt — Discretionary power of court to wind up a company — Where balance of justice lies

The petitioners brought this winding up petition against the respondent pursuant to s 218 of the Companies Act 1965. The petitioners claim from the respondent for a sum of RM320,826.30 being liquidated damages for late delivery of shop-houses built by the respondent. There is no judgment obtained by the petitioners in respect of the amount claimed. The respondent disputed the petitioners' claim on the premise, inter alia, that the said property in question was uncompleted and the entire project was stagnant. There are 37 creditors (who are also purchasers of the units in the said project) opposing the petition (opposing creditors). The main ground for the 37 opposing creditors opposing the winding up of the respondent is that because the respondent had under the supplemental agreement which was entered between the respondent and the opposing creditors, completed 66 units of the said project leaving a balance of 44 units and for these remaining units. The respondent has completed 97% of building works is now at the stage of completing the balance of the said building as stated in its letter dated 30 September 2006. The petitioners filed this petition to wind up the respondent company despite them being invited to join to support the revival and completion of the said project.

Held, dismissing petition with costs:

(1) In the present case, the petitioner had failed and/or omitted to state in its intitulement, under which limb of s 218 the petitioner was moving the court. This court is of the view that from the principles of law laid down, the present petition ought to be struck out for want of compliance. The strict compliance of law in the Companies Act 1965, especially when one intends to wind up the company is analogous to 'an accused person standing for a murder trial, whereby the benefit of the doubt must always be given to the accused'. The court is burdened with the rules of natural justice and also under an obligation to ensure that the petitioners themselves are not in breach of any provision and/or rule of law, when they petition to wind up a company (see paras 18, 25).

(2) Even assuming the court is wrong in coming to the above conclusion, the court shall now deal with the merit of the petition. As there is no judgment obtained by the petitioner against the respondent in respect of the amount claimed, the petitioners must satisfy the court that they are 'creditors' and the amount claimed as stated in the s 218 notice was actually 'owing and due'. The notice of indebtedness issued under s 218 is not evidence of the debt. In other words, the petitioners must prove that they are 'creditors' and the respondent company is a 'debtor'. If the debt is disputed substantially and the petitioners are not considered as 'creditors', then the petitioners have no locus standi to file the petition for winding up of the respondent based on the said notice (see para 26).

(3) The court has a discretionary power to wind up a company under s 218 (see *Kam Wah Theatre Sdn Bhd v Fahlum Development Sdn Bhd* [1990] 2 MLJ 511. In considering whether or not to allow the petition filed by the petitioners, this court should consider the voice of the majority of creditors in the same class as the petitioners, that is the opposing creditors. Since the said project is 97% completed and is in its final stages, it is of public policy interest as well as the balance of justice require that the respondent should not be wound up as petitioned by the petitioners. The respondent should be given the opportunity to continue and to complete the said project until full completion since the said project is 97% completed and is in its final stage (see paras 46, 59).

[Bahasa Malaysia summary

Pempetisyen-pempetisyen membawa petisyen penggulungan terhadap responden menurut s 218 Akta Syarikat 1965. Pempetisyen menuntut daripada responden jumlah RM320,826.30 untuk ganti rugi tertentu atas kelewatan hantar-serah kedai-rumah yang dibina oleh responden. Tiada penghakiman yang diperolehi oleh pempetisyen berhubung dengan amaun tuntutan. Respondent mempertikaikan tuntutan pempetisyen-pempetisyen atas sebab antara lain, bahawa hartanah tersebut tidak disiapkan dan keseluruhan projek tersebut adalah terbiar. Terdapat 37 pemiutang-pemiutang (yang juga merupakan pembeli-pembeli unit projek tersebut) yang menentang petisyen tersebut (pemiutang yang menentang). Alasan utama untuk 37 pemiutang yang menentang penggulungan responden tersebut adalah kerana di bawah satu perjanjian tambahan yang dimasuki di antara responden dan pemiutang-pemiutang yang menentang, responden telah menyiapkan 66 unit-unit projek tersebut dan masih tinggal 44 unit-unit dan untuk unit-unit ini, responden telah menyiapkan 97% kerja-kerja pembinaan dan sekarang pada peringkat menyiapkan baki bangunan tersebut seperti yang dinyatakan di surat mereka yang bertarikh 30 September 2006. Pempetisyen-pempetisyen telah memfailkan petisyen ini untuk menggulungkan syarikat responden walaupun mereka telah dipelawa untuk menyertai untuk menyokong pemulihan semula dan penyempurnaan projek tersebut.

Diputuskan, menolak petisyen dengan kos:

(1) Dalam kes ini, pempetisyen telah gagal dan/atau tidak menyatakan dalam

tajuknya, cabang s 218 yang mana yang digunakan oleh pempetisyen. Mahkamah ini berpendapat bahawa atas prinsip-prinsip undang-undang yang telah ditetapkan, petisyen ini harus dibatalkan atas sebab ketidakpatuhan. Pematuhan ketat undang-undang di Akta Syarikat 1965 terutama apabila seseorang ingin menggulungkan sebuah syarikat adalah seperti 'orang kena tuduh dalam satu perbicaraan pembunuhan, manfaat keraguan harus diberikan kepada tertuduh'. Mahkamah ini dibebankan dengan rukun-rukun keadilan asasi dan juga di bawah satu obligasi untuk memastikan bahawa pempetisyen-pempetisyen sendiri tidak melanggari apa-apa peruntukan dan/atau kepatuhan perundangan, apabila mereka petisyen untuk menggulungkan sebuah syarikat (lihat perenggan 18 & 25).

(2) Walaupun sekiranya mahkamah salah dalam kesimpulan di atas, mahkamah sekarang akan menimbangkan merit petisyen tersebut. Oleh kerana tiada penghakiman yang diperolehi oleh pempetisyen terhadap responden berhubung dengan amaun yang dituntut, pempetisyen-pempetisyen harus memuaskan mahkamah bahawa mereka adalah 'pemiutang' dan amaun yang dituntut seperti yang dinyatakan di notis 218 tersebut adalah sebenarnya 'tertunggak dan tidak dibayar'. Notis keberhutangan yang dikeluarkan di bawah s 218 bukannya bukti hutang tersebut. Dalam kata yang lain, pempetisyen-pempetisyen mesti membuktikan bahawa mereka adalah 'pemiutang' dan syarikat responden adalah 'penghutang'. Sekiranya hutang tersebut dipertikaikan dengan banyak dan pempetisyen-pempetisyen tidak dianggap sebagai 'pemiutang', maka pempetisyen-pempetisyen tidak mempunyai locus standi untuk memfailkan petisyen untuk menggulungkan responden berdasarkan notis tersebut (lihat perenggan 26).

(3) Mahkamah ini mempunyai budi bicara untuk menggulungkan sebuah syarikat di bawah s 218 (lihat *Kam Wah Theatre Sdn Bhd v Fahlum Development Sdn Bhd* [1990] 2 MLJ 511). Dalam mempertimbangkan sama ada untuk membenarkan atau tidak petisyen yang difailkan oleh pempetisyen-pempetisyen, mahkamah ini harus menimbangkan suara majoriti pemiutang-pemiutang dalam kelas yang sama seperti pempetisyen-pempetisyen, iaitu pemiutang yang menentang. Oleh kerana projek tersebut telah 97% disiapkan dan dalam peringkat yang akhir, demi kepentingan polisi awam dan juga atas keseimbangan keadilan ia adalah perlu bahawa responden tidak patut digulungkan seperti yang dipetisyen oleh pempetisyen-pempetisyen. Responden seharusnya diberi peluang untuk menyambung dan menghabiskan projek tersebut sehingga penghabisan sepenuhnya oleh kerana projek tersebut telah pun 97% siap dan dalam peringkat yang akhir (lihat perenggan 46 & 59).]

Notes

For cases on pleadings generally, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1262–1814.

For cases on petition under s 218, see 3(1) *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1229–1246.

Cases referred to

ABC Coupler & Engineering Co Ltd, Re [1961] All ER 354 (refd)

Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457 (refd)
Crigglestone Coal Co Ltd, Re [1906] 2 Ch D 327 (refd)
Ho Siew Choong & Ors v Everworth Sdn Bhd [2005] MLJU 107 (refd)
Jurupakat Sdn Bhd v Kumpulan Good Earth (1973) Sdn Bhd [1983] 3 MLJ 49 (refd)
Kim Wah Theatre Sdn Bhd v Fahlum Development Sdn Bhd [1990] 2 MLJ 511 (folld)
Kok Fook Sang v Juta Vila (M) Sdn Bhd & Ors [1996] 2 MLJ 666 (refd)
Loh Wai Lian v SEA Housing Corporation Sdn Bhd [1987] 2 MLJ 1 (refd)
Pilecon Engineering Bhd v Remaga Jaya Sdn Bhd [1997] 1 MLJ 808 (refd)
Syarikat Mohd Moor Yusof Sdn Bhd v Polibina Engineering Enterprise Sdn Bhd (in liquidation) [2006] 1 MLJ 446 (refd)
Urn Yee Khei v Berjaya Times Square Sdn Bhd [2003] 1 CLJ 527 (refd)

Legislation referred to
Companies Act 1965 ss 217, 218, 221
Housing Developers (Control & Licensing) Act 1966
Selangor State Development Corporation Enactment 1964

WY Chin (Shui-Tai) for the petitioners.
Ganesh Perumal (Ringo Low & Associates) for the respondent.
Pramjit Singh (Manjit Singh Sachdev) for the oposing creditors.
Syamsul Amri for the Official Assignee Department.

Ramly Ali J:

[1] The petitioners brought this winding up petition against the respondent pursuant to s 218 of the Companies Act 1965 (the Act) on the ground that the respondent was unable to pay its debt and that it is just and equitable that the respondent company be wound up.

[2] The petitioners claim from the respondent for a sum of RM320,826.30 being liquidated damages for late delivery of shop houses built by the respondent. A statutory notice under s 218 of the Act has been issued to the respondent. There is no judgment obtained by the petitioners in respect of the amount claimed.

FACTUAL BACKGROUNDS

[3] The respondent is a licensed developer and undertook to develop a project known as 'Prima Selayang' consisting of a four storey shoplots (consisting of 110 units of shop-office) ('project').

[4] Vide a sale and purchase agreement dated 24 December 1996 ('S&P'), the respondent with the consent of Perbadanan Kemajuan Negeri Selangor, a statutory body incorporated in Malaysia under the Selangor State Development Corporation Enactment 1964 agreed to sell to the petitioners ('purchasers') and the petitioners agreed to purchase the shop office building distinguished as four storey shop-office, Type A1, Lot No 6, Prima Selayang-Phase 1 ('Property') for the consideration of RM770,000.

[5] Pursuant to cl 20.2.1 of the said S&P, the respondent agreed to deliver vacant possession of the said property to the petitioners within thirty six months from the date of approval of the Proposed Building Plans.

[6] The respondent obtained the approved building plans for the development on 14 May 1997. As such the respondent's obligation to deliver vacant possession to the petitioners expires on/or before 13 May 2000.

[7] Further, pursuant to cl 20.22 of the said S&P, it was agreed that in the event the respondent failed to deliver vacant possession of the said property within the 36 months as agreed, the respondent shall pay to the petitioners agreed liquidated damages at the rate of eight per centum (8%) per annum of the purchase price on a daily basis commencing from the expiry of the 36 months and any extensions (if available) till the date of the notice from the respondent to the petitioners to take possession of the said property.

[8] It was also agreed between the petitioner and the respondent that:

(a) Clause 19 of the S&P:

... all outgoings including quit rents, rates, assessment in respect of the property shall from the date of this agreement be borne by the purchaser...;

(b) Clause 20.1 of the S&P:

The purchaser shall not be entitled to vacant possession of the property until the purchaser shall have duly paid to the developer all monies payable...; and

(c) Clause 20.2.3 of the S&P:

Upon completion of the property and such completion is so certified by the Developer's Building Consultant and provided that the purchaser shall have paid to the developer all installments and all monies payable under this agreement and shall have performed and observed all the covenants on the purchaser's part herein contained the developer shall by a written notice to the purchaser request the purchaser to accept delivery of vacant possession of the property...

[9] Vide their solicitor's letter dated 26 July 2005, the petitioner demanded a sum of RM320,826.30 as agreed liquidated damages as at 26 July 2005.

[10] Subsequently, the petitioner vide their solicitor's letter dated 8 August 2005 issued a statutory demand on the respondent pursuant to s 218 of the Companies Act 1965 for the said 'debt'.

[11] In response, the respondent vide its solicitor's letter dated 15 August 2005, disputed the petitioners' claim on the premise inter alia that, the said property in question was uncompleted and the entire project was stagnant.

[12] As the demand were not honoured by the respondent within twenty one days from its issuance the petitioner proceeded to file the winding up petition, hence the present suit before this court. There are 37 creditors (who are also purchasers of the units in the said project) oppose the petition ('opposing creditors').

[13] The said project had been abandoned since the year 2000. Pursuant to a meeting held at the Lembaga Perumahan Dan Hartanah Selangor on 25 June 2005 under the guidance of the Chairman of 'Jawatankuasa Tetap Perumahan, Pengurusan Bangunan Dan Setinggan' Yang Berhormat Dato' Haji Mohd Mokhtar bin Haji Ahmad Dahlan in the presence of the purchasers, the respondent's representatives, the Majlis Pebandaran Selayang's representatives, parties had agreed to revive the said abandoned project and come to a settlement agreement whereby the respondent will complete and continue with the said project and apply for the Temporary Certificate of Fitness.

[14] To this effect, the respondent and the opposing creditors had entered into a supplemental agreement dated 24 October 2005. Under this supplemental agreement, the respondent had completed 66 units of the said project with practical completion certificate from the architect and had delivered vacant possession of the said 66 units via letter dated 16 March 2006.

[15] The respondent had also obtained individual titles for each shop-lot units including the units belonging to the petitioners and opposing creditors. All deposits and contributions to Tenaga Nasional Berhad (TNB) and Syarikat Bekalan Air Selangor (SYABAS) had been duly paid.

[16] Via letter dated 30 September 2006, the respondent confirmed that it had completed 97% of building works on the remaining 44 units of the shop-office and is continuing to work on these units progressively.

[17] The petitioners had filed this petition to wind up the respondent company despite them being invited to join to support the revival and completion of the said project.

PRELIMINARY ISSUE

[18] In the present case, the petitioner had failed and/or omitted to state in its intitulement, under which limb of s 218 the petitioner was moving the court.

[19] Section 218 of the Act provides for various circumstances under which a petition can be presented. The circumstances are stipulated from s 218(1)(a) to (n) of the Act.

[20] However the petitioners in the present case had failed and/or omitted to state the particular subsection under which the petition was presented.

[21] In the Court of Appeal case of *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457, the court held as follows:

> An originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or rule of court under which the court is being moved, otherwise it would be an embrassing pleading and liable to be struck out...

Further, the court held that:

> The summons does not... state any particular rule of court in its intitulement. Now, I think that is not only wrong but plainly embarrassing. How, might one ask, is a defendant or the court to determine which rule of court the plaintiff is invoking unless he explicitly specifies it? If a defendant and the court should have to conduct a close examination of the supporting affidavit in each case in order to determine the particular jurisdiction or power that is being invoked by an originating summons or other originating process that requires an intitulement, then a plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning whatsoever to his opponent or the court, It would make a mockery of the principle that there must be no surprise in civil litigation...

[22] A case on point to support this contention would be the court of appeal decision of *Kok Fook Sang v Juta Vila (M) Sdn Bhd & Ors* [1996] 2 MLJ 666. In this case the petitioner had also filed the petitioner without making a specific reference to the sub-section to s 218(1) of the Act. His Lordship, Justice Mahadev Shanker, held that at p 672:

> Where a petitioner presents a petition to wind up a company under s 218(1) of the Act, it is incumbent upon him to state which of these grounds he is relying upon and not ask the court to search his petition for facts which may be thought capable of being slotted into some particular subsection.

[23] The above principle of law was applied with approval in the recent case of *Ho Siew Choong & Ors v Everworth Sdn Bhd* [2005] MLJU 107 (High Court). In that case the petitioner merely stated that the petition was filed pursuant to s 218(e) and (i). The high court judge, struck off the petition for non compliance with the provision under the Act.

[24] Similarly in the present case before this court, the petitioner had also failed to identify with clarity under which subsection of the said act, the petition was presented.

[25] Hence this court is of the view that from the principles of law laid down, the present petition ought to be struck out for want of compliance. The strict compliance of law in the Companies Act 1965, especially when one intends to wind up the company is analogous to 'an accused person standing for a murder trial, whereby the benefit of the doubt must always given to the accused'. The court is burdened with the rules of natural justice and also under an obligation to ensure that the petitioners themselves are not in breach of any provision and/or rule of law, when they petition to wind up a company.

[26] On this score alone, the petition ought to be struck off. Even assuming the court is wrong in coming to the above conclusion, the court shall now deal with the merit of the petition. The present petition was filed by the Petitioners on the strength of a statutory notice issued by the petitioners under s 218 of Act, on the assumption that the respondent has failed or unable to pay its debt during the twenty one days mentioned in the notice. In this case, there is no judgment obtained by the petitioner

against the respondent in respect of the amount claimed. That being the case, the petitioners must satisfy the court that they are 'creditors' and the amount claimed as stated in the s 218 notice was actually 'owing and due'. The notice of indebtedness issued under s 218 is not evidence of the debt. In other words, the petitioners must prove that they are 'creditors' and the respondent company is a 'debtor'. If the debt is disputed substantially and the petitioners are not considered as 'creditors', then the petitioners have no locus standi to file the petition for winding up of the respondent based on the said notice.

[27] In the present case, the debt claimed in the notice is seriously disputed by the respondent. As such the petitioners will have to prove their claim in court. This claim is based on contract and is not automatically paid as opposed to the claim by house buyer under the Housing Developers (Control & Licensing) Act 1966.

[28] In the case of *Syarikat Mohd Moor Yusof Sdn Bhd v Polibina Engineering Enterprise Sdn Bhd (in liquidation)* [2006] 1 MLJ 446, Court of Appeal held at p 446 that:

(1) In his matter, there was no judgment debt and the debt claimed was disputed. Therefore, the notice of indebtedness issued under s 218 was not evidence of the debt;

(2) The indebtedness was clearly disputed and the sum referred to in the respondent's notice issued under s 218(2) was not a judgment sum. The notice was nothing more than a letter of demand sent by the respondent's solicitors, the purpose of which was to invoke the presumption of inability to pay its debts. The respondent would still have to prove that it was a creditor and that the sum so stated in the notice was owing and so due.

[29] The court in the case of *Jurupakat Sdn Bhd v Kumpulan Good Earth* (1973) Sdn Bhd [1983] 3 MLJ 49 at page 49 held that:

(1) It is common ground that there is no judgment debt in the present case. The question for the court to consider is whether the petitioner is a creditor and the Respondent company is a debtor;

(2) From the evidence, it is clear that the respondent company disputed the alleged debt claimed by the petitioner. Indeed, the respondent company claimed that the petitioner is in a debit balance. In the circumstances, the petitioner is not a creditor as envisaged in s 217 of the Companies Act 1965.

(3) The petitioner is not entitled to file the petition, as it has no locus standi. The action of the petitioner in filing the petition is an abuse of the process of the court.

[30] In the present case, there are reciprocal obligations present in the said S&P The first is the respondent's obligation to deliver as a developer and the petitioners' obligation to pay the consideration in full. With regards to their respective obligations the court refers to:

(i) Clause 20.2.1 of the said S&P on he respondent's obligation to deliver vacant possession;

(ii) Clause 20.2.2 of the said S&P on the respondent's liability to pay liquidated damages if cl 20.2.1 is not fulfilled; and

(iii) Clause 19 and 20.2.3 of the said S&P on the petitioners' obligation to pay the consideration in full.

[31] The respondent had three years from the date of the said S&P to deliver vacant possession to the petitioners. The last date to do so was on 13 May 2000.

[32] However, the petitioners on their own accord defaulted on the progressive payment towards the purchase price of the property. The petitioner had failed and/or refused and/or neglected to pay the sum of RM5,580, which was part of a progressive payment towards the purchase price of the property.

[33] The petitioners defence to the non payment is that they did not receive the notice for payment and in the event the amount was not paid they are entitled to exercise their right of set-off against what is being claimed by them.

[34] The court cannot accept this argument. The right to set-off in the present case is not available to the petitioners as the petitioners themselves had defaulted their obligations to pay the consideration in full. As such the Respondent's obligations pursuant to cll 20.2.1 and 20.2.2 of the S&P have not accrued pursuant to cl 20.2.3 of the same.

[35] In this regard the court would like to refer to the case of *Lim Yee Khei v Berjaya Times Square Sdn Bhd* [2002] MLJU 635; [2003] 1 CLJ 527 (High Court). The court in dealing with similar scenario as present held that:

> Whilst the defendant had delayed the delivery of vacant possession of the said property to the plaintiff, the set-off was not yet available to the plaintiff unless the period for completion had transpired.

The court further held that:

> ln the present case the amount that is purportedly claimed by the Plaintiff is not yet due, and therefore the true nature of the amount that is claimed by the Plaintiff is not essentially in the nature of a cross-claim for debt or damages that are due.

[36] In the Privy Council case of *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1, the purchaser also initiated a claim for liquidated ascertained damages pursuant to the contract executed between the parties when the vendor failed to deliver vacant possession within the agreed period and subsequently refused to pay the final progressive payment towards the purchase price. The Privy Council held that at p 4:

> … the only sensible construction of clause 17 is that it imposes an obligation to pay in substitution for any other right to damages which sum to be calculated and ascertained at a particular date and that until sum has been ascertained it does not become due and cannot be sued for.

In essence the Privy Council decided that until and unless the purchaser in that case had fulfilled his obligation in full and the building has yet to be completed, the right to sue for damages for late delivery is not available and hence cannot be sued for.

[37] The above considerations clearly indicate that the debt in question (as claimed by the petitioners in the present case) is seriously disputed by the respondent. This court (being winding up court) is not an appropriate forum for the petitioners to establish their claim. The petitioners should have filed a separate action in the civil court for that purpose. This court is not a 'debt collection agency'. On this ground alone, the present petition cannot stand and ought to be dismissed with costs.

[38] Even assuming the above finding is wrong and assume the court finds that the petitioners are 'creditors' and the debt is not disputed, the court shall now consider whether on the issues of public policy and balance of justice, the petition ought to be granted or not.

WINDING UP ORDER — DISCRETIONARY POWER OF THE COURT

[39] The court has a discretionary power to wind up a company under s 218 of the Companies Act 1965. The use of the permissive word 'may' in ss 217, 218 and 221 of the Act — rather than the mandatory 'must' or 'shall', gives the court a discretion whether or not to wind up a company, even if the Petitioners have shown that they are 'creditors' and the debt in question is not disputed.

[40] On this issue the Court is in full agreement with Siti Norma Yaakob J in the case of *Kim Wah Theatre Sdn Bhd v Fahlum Development Sdn Bhd* [1990] 2 MLJ 511 where she held at p 512:

> The law on the functions of the court when dealing with a petition for the compulsory winding up of a company is that once the debt has been proved to be unpaid and that the company is insolvent, the petitioner is entitled to a winding up order ed debito justitiae. However, whilst continuing to recognise the creditor's prima facie right to a winding up order, there are instances where such right is subject to the discretion provided by the language of s 221(1) of the Companies Act 1965, in that the court may decide not to do so. One of such instances is where the petition is opposed by a majority of the creditors.'

[41] The learned author of the *Law of Company Liquidation* (3rd Ed) (Australia) at p 61 under the title 'Discretion to Refuse Order' has expressed his view as follows

> Indeed, it is now settled that the creditor's rights are always subject to the overriding discretion which is reposed in the court both the introductory words of s 364 and by the permissively worded language of s 367(1), with the result that the court is never bound to make an order merely upon proof of a ground for winding up, but has a discretion to decide whether or not it will do so. Its power to refuse an order is, however, fairly strictly regulated and is exercised in accordance with principles which are relatively well defined.

[42] The same principle was also adopted and followed by Kamalanathan Ratnam JC in the case of *Pilecon Engineering Bhd v Remaga Jaya Sdn Bhd* [1997] 1 MLJ 808 when he said (at page 812) as follows:

> However, notwithstanding the fact that an unpaid creditor of a company is entitled to a winding up order *ex debito justitiae*, I hold that rule is subject to exceptions. These are where:
>
> (i) the petitioner's debt amounts to less than RM500;

(ii) the debt is bona fide disputed by the respondent;

(iii) the respondent has paid or tendered payment of the petitioner's debt;

(iv) the winding up is opposed by other creditors; and

(v) the respondent is in the process of being wound up voluntarily.

RIGHT OF THE PETITIONERS TO WIND UP THE RESPONDENT VS RIGHT OF MAJORITY OF THE CREDITORS

[43] The court is of the view that the right to have accompany wound up is a right which belongs not to the petitioners alone, but to all the class of unsecured creditors to which the petitioners belong whereby the opposing creditors are the majority.

[44] In the case of *Pilecon Engineering Bhd v Remaja Jaya Sdn Bhd* at p 812, the judge was referred to the case of *Re Crigglestone Coal Co Ltd* [1906] 2 Ch D 327 at pp 331–331, where Buckley J said:

> The right ex debito justitiae is not his individual right, but his representative right. If a majority of the class are opposed to his view, and consider that they have a better chance getting payment by abstaining from seizing the assets, then, upon general grounds and upon s 91 of the Companies Act 1862, the Court gives effect to such right as the majority of the class desire to exercise. This is no exception. It is a recognition of the right, but affirms that it is the right not of the individual, but of the class; that it is for the majority to seek or to decline the order as best serves the interest of their class. It is a matter upon which the majority of the unsecured creditors are entitled to prevail, but on which the debtor has no voice.

[45] In the case of *Re ABC Coupler & Engineering Co Ltd* [1961] All ER 354, the petition is opposed by a number of creditors whose debts (disregarding those owed to the subsidiary companies of the company) amount to 18,328 Pounds odd, that being a sum about 800 Pounds larger than the debt owed to the petitioning creditors. It was said by the learn Judge Pennycuick J at p 356:

> It seems to me, however, that it must still be right, having regard to the terms of s 346, to have regard to the wishes of the majority of the creditors. Although those wishes may not be conclusive, they still posses great weight, and it seems to me that, where the wishes of the majority of the creditors are, on the face of them, reasonable, the court ought to follow those wishes in the absence of any special circumstances.

Further, at p 357, the judge went on to say that:

> In all the circumstances, it seems to me that in the present case the right course for me to take is to have regard to the wishes of the majority in value of the creditors (disregarding the subsidiary companies) and to refuse to make an order on the petition.

[46] The court was also referred to the case of *Kim Wah Theatre Sdn Bhd v Fahlum Development Sdn Bhd*. In that case, together with the respondent, the large number of the other creditors opposing the petition are purchasers of the low cost flats that the respondent, as housing developers, are trying to complete on a housing project

known as Taman Rishah, at Jelapang, Ipoh pursuant to a joint venture agreement the respondent had with the owners of the land. The total value of the debts owed by the respondent to all the opposing creditors amount to over RM36m whilst the value of those favouring a winding up order total just over RM5m. It was held by the judge at p 512 that:

> The law on the functions of the court when dealing with a petition for the compulsory winding up of a company is that once the debt has been proved to be unpaid and that the company is insolvent, the petitioner is entitled to a winding up order *ex debito justitiae*. However, whilst continuing to recognise the creditor's prima facie right to a winding up order, there are instances where such right is subject to the discretion provided by the language of s 221(1) of the Companies Act 1965, in that the court may decide not to do so. One of such instances is where the Petition is opposed by a majority of the creditors. In *Re ABC Coupler & Engineering Co Ltd*, it was held that in deciding whether to make a compulsory winding up order, the court should have regard to the wishes of the majority of the creditors, because these wishes, although not conclusive, posses great weight and if they are reasonable, the court should follow them in the absence of special circumstances.

[47] By referring to the above mentioned cases, the court is of the view that in considering whether or not to allow the petition filed by the petitioners, this court should consider the voice of the majority of creditors in the same class as the petitioners, that is the opposing creditors.

[48] In this present case, there were 66 creditors who already got their units completed with certificate of practical completion and amongst them, they are 37 creditors who have filed notices of opposition to the winding up of the respondent. Although the petitioner may have prima facie right to an order to wind up the respondent, this is a right that belongs to the class of creditors of whom the petitioners are one.

[49] The main ground for the 37 opposing creditors opposing the winding up of the respondent is that because the respondent had under the supplemental agreement which was entered between the respondent and the opposing creditors, completed 66 units of the said project leaving a balance of 44 units and for these remaining units, the respondent has completed 97% of building works and now is in the stages of completing the balance of the said building as stated in its letter dated 30 November 2006.

[50] Furthermore, since the said project is nearing completion and is in its final stages, the respondent should be given the opportunity to complete the said project and obtain the certificate of fitness for all the units. Furthermore, the majority of the creditors wishes need to be considered, as it is the public interest and the interest of the developer who is proactively coming forward and completing the units and applying to obtain the certificate of fitness be allowed to continue and complete the said project.

[51] In the case of *Kim Wah Theatre Sdn Bhd v Fahlum Development Sdn Bhd,* it was held by the judge at p 512 that:

> Admitted the judgment debt is due to the petitioner since 1986 but when balancing the wishes of the petitioner against the wishes of the purchasers that make up the majority of the creditors, I consider no special circumstances have been shown by the petitioner to warrant the winding up being made in its favour. On those findings, I had ordered a stay for ten months as that was the undertaking given by he respondent that they would be able to complete the flats on Phase IV by that time and with the profits derived, pay out the debt due to the petitioner. On that undertaking, I had then adjourned the petition to 3 September 1990.

[52] By referring to the above-mentioned cases, the court is of the view that this court should consider the voice of the majority of the creditors and allow the respondent to complete the said project and obtain the certificate of fitness for all the units especially when he respondent is willing and able to complete the said project.

PUBLIC INTEREST CONSIDERATION

[53] The court is of the view that in exercising discretion whether or not to wind up the respondent, the court should also consider not only the interest of the petitioner but also the public interest which includes the 37 opposing creditors, who opposed the said winding up petition.

[54] In their various affidavits, the petitioners have failed to show that the respondent were unwilling or unable to complete the completion of the units and obtain the certificate of fitness. Furthermore, should the respondent be wound up, there would be no benefit which could accrue to the petitioners and the petitioners would gain nothing other than the satisfaction of winding up the respondent and the said project will come to a stand still with no person to immediately take over. Further, the security guards employed by the respondent guarding the said project would also no longer be there opening the units from being stripped by vandalism of the wires, steels, windows and etc, which had happened before.

[55] The abandoned project such as the present case should be completed and delivered to the buyers including the petitioners and the opposing creditors rather than abandoned totally because of a fruitless winding up order.

[56] This has been clearly stated by Kamalanathan Ratnam J, in the case of *Pilecon Engineering Bhd v Remaja jaya Sdn Bhd* at p 813:

> Recovering an abandoned housing project is akin to injecting life into the community in that area. Out of that one project much benefit cold be accrue to the community. Schools will emerge, public utilities will be provided and the general upliftment of life will no doubt bring harmony and contentment, thus nurturing a satisfied society. If another opportunity can be given to the RM to revive this abandoned project, so be it.

[57] It would be against public policy if the ordinary house buyers, having paid the entire purchase price were to be effectively deprived of their rights under the sale and purchase agreement.

[58] In the present case, the respondent had completed 66 units of the said project leaving a balance of 44 units and for these remaining units, the respondent has completed 97% of building works and now is continuing to complete the balance of the said building as stated in is letter dated 30 September 2006. A

[59] Since the said project is 97% completed and is in its final stages, it is of the public interest that the respondent be given the opportunity to complete the said project and obtain the certificate of fitness for all the units. B

[60] The petitioners had in their various affidavits stated that it would be better and faster for an independent party like a liquidator to take over the respondent's role to complete the said project. C

[61] The court is reluctant to accept this argument. If the respondent be wound up, all the purchasers including the opposing creditors and the Petitioners will face a serious uncertainty as whichever receiver or liquidator is appointed it will take a very much longer time to understand the project and will not be able to have all the paper works, plans and documents be done in this short time in order to complete the said project and thereafter obtain the certificate of fitness. D

[62] Further, liquidator needs funds and monies. Where are they going to get the monies to do and complete the said project? Here, the respondent is willing and able to complete the units with no additional payments. As such, there is no logic in getting a liquidator to do it, where the respondent is willing, able and prepared to complete the said project without additional monies to be paid by the buyers. E

[63] This in turn will further burden all the buyers including the opposing creditors who have been waiting patiently for the past ten years and had been servicing their loan installments and interest without being able to occupy the units and be liable to pay monies for liquidator to complete the said project. F

[64] The same sentiment was also expressed by Kamalanathan Ratnam J, in the case of *Pilecon Engineering Bhd v Remaja Jaya Sdn Bhd* where he stated that at p 817: G

> If winding up order is made, then the house buyers will have to look to the official receiver and not to the RM- to perform the obligations under the sale and purchase agreement. This means that it would be the official receiver who would have to subdivide titles in the case of the landed properties and obtain strata titles in the case of the apartments, obtain permanent certificates of fitness and attend to any defects that appear within the detects liability period. I do not envisage that the official receiver ought to be burdened with such mundane matters. He neither has the time nor the facilities, nor the manpower, to do such work. Besides, there are no assets available for him to utilise the resources. It would be against public policy if the ordinary house buyers, having paid the entire purchase price, were to be effectively deprived of their rights under the sale and purchase agreement. H I

[65] In the circumstances, the court finds that since the said project is nearing completion and is in its final stages, the respondent should be given the opportunity to complete the said project and obtain the certificate of fitness for all the units.

[66] In the circumstances, the public policy interest as well as the balance of justice require that the Respondent should not be wound up as petitioned by the petitioners. The respondent should be given the opportunity to continue and to complete the said project until full completion since the said project is 97% completed and is in its final stage; all deposits and contributions to Tenaga Nasional Berhad (TNB) and Syarikat Bekalan Air Selangor (SYABAS) had been duly paid, the respondent is willing and able to complete the said Project without any additional costs to the buyers including the petitioners and opposing creditors; and it is the wishes of the majority of the creditors (purchasers) to gave the opportunity to the respondent to continue and complete the said project.

CONCLUSION

[67] On the above considerations the court finds that the petition herein should be dismissed or any one of the following grounds, namely:

(a) the petitioners had failed to identify with clarity under which sub-section of s 218 of the Companies Act 1965, the petition was presented; or

(b) the debt in question is seriously disputed by the respondent and therefore the petitioners are not 'creditors'; and/or

(c) public policy interest and the balance of justice require that the respondent should not be wound up, but instead to be allowed to complete the said project.

Therefore the petition is dismissed with costs.

Petition dismissed with costs.

Reported by Sally Kee